Bill C-47,
the new divorce act

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BILL C-47, THE NEW DIVORCE ACT: A COMPARISON WITH C-10

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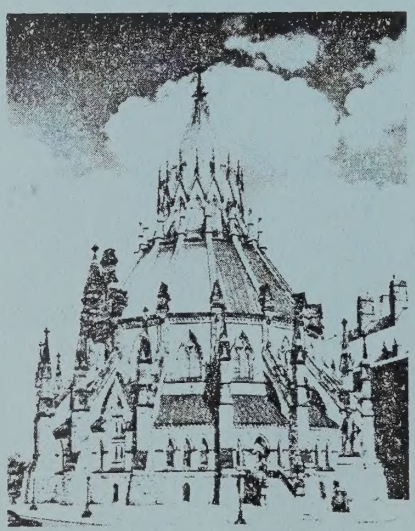
9 May 1985



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BILL C-47, THE NEW DIVORCE ACT: A COMPARISON WITH C-10

Bill C-47 proposes a new act to repeal the present Divorce Act. Bill C-10 (32nd Parliament) would have amended the present Act.

GROUNDS FOR DIVORCE (CLAUSE 8)

Under the present law a spouse may be granted a divorce on the grounds of the other's misconduct - the other's fault - or the fact of marriage breakdown. Misconduct is defined mainly in sexual terms (adultery, homosexuality, etc.). It also includes physical and mental cruelty. There is no waiting period for a divorce on these grounds (other than the delay in getting the matter before the courts). It is possible to be granted a divorce on the grounds of adultery within six months of filing a petition, as long as all other issues relating to the marriage breakdown are agreed upon. This is often not the case if the family owns property, has children, or if one of the spouses has a moderately well-paying job.

Marriage breakdown is presently established by a period of separation, or, in certain circumstances, by some other waiting period. But fault is relevant here too. Spouses who have lived apart for three years are entitled to a divorce on this ground so long as neither has abandoned the other; a spouse who leaves the marriage is entitled to a divorce only after five years. Someone whose spouse has been sentenced to 10 years or more in prison may be divorced on this ground after two years. Someone whose spouse is addicted to alcohol or drugs may be divorced after three years.

Bill C-47 would not expressly distinguish between fault and no fault grounds - all grounds would be described as "marriage breakdown". However, marriage breakdown would be established in two different ways which incorporate the "fault"-"no fault" distinction.

The first way would be through the separation of the couple for one year. Separation would be established by both the physical separation of the couple, and the intention of one of them - not both - to separate. The one-year period would be measured back from the day the divorce decree is granted. In other words the separated couple need not wait until the prescribed period of separation has elapsed before beginning divorce proceedings, as they must do now. (However, they must be living apart on the day they begin divorce proceedings.)

The second way to establish marriage breakdown would be for one spouse to establish the adultery or the physical or mental cruelty of the other. The remaining fault grounds under the present Act would be eliminated.

Bill C-10 would have not incorporated any fault grounds into its provisions. However, it would also have allowed a couple to establish marriage breakdown in two different ways. The first would have been for the husband and wife both to state through a divorce petition that the marriage had broken down. They could then get a divorce a year after the petition date. They would not have had to separate. The second way to establish breakdown would have been a one-year separation on basically the same terms as those set out in Bill C-47.

The first method was probably proposed as an answer to those who object to a separation period as a ground for divorce because the provision forces a couple to separate without honestly attempting a reconciliation. Given the first option in Bill C-10, a couple would have a year to try to make their marriage work without this affecting their right to be divorced should the attempt fail. Provisions in Bill C-47 for reconciliation - which are the same as those in the present Act - will be discussed further on.

COROLLARY RELIEF (SUPPORT AND CUSTODY ORDERS)

A. Support

Support payments are known as "maintenance" payments under the present Divorce Act. In Bill C-47 the term is changed to conform to what is now the more usual term.

The present Act provides little guidance as to how orders for support should be determined. In the words of the Act, courts may grant orders "having regard to the conduct of the parties and conditions, means and other circumstances of each of them". Many now believe that the misconduct of either spouse should not be a major factor in determining support. Thinking has also evolved with respect to the responsibilities of both spouses in a marriage, and how this should affect the issue of support. Provinces have changed their own support laws to incorporate such thinking.

1. Basis on Which Support for Spouses and Children is Awarded (Clause 15)

a. Factors Determining Support for Spouses (subs. (5))

Bill C-47 would expand the wording of the present Act to clarify what factors are relevant to support orders. In doing so it would reflect the wording of most provincial law in this area. Newly stated factors are: the needs of each spouse, the length of time the spouses lived together, and the functions each spouse performed during the marriage.

It is clearly stated that the misconduct of a spouse should not be a factor in determining support awards.

Bill C-10 did not expand the present law in this way. It did contain an analogous provision regarding the irrelevance of misconduct to the determination of support.

b. Objectives of Support Orders for Spouses (subs. (6))

Bill C-47 would set out a number of objectives - or principles - applicable to spousal support orders. These are:

- to recognize economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- to apportion between the spouses any financial consequences arising from the care of any child. This is in addition to the objectives regarding support for a child which are set out in subs. (7);
- to relieve any economic hardship of the spouses arising from the breakdown of the marriage;
- insofar as practicable to promote the economic self-sufficiency of each spouse within a reasonable period of time.

A similar provision for objectives existed in Bill C-10. It differed from that in Bill C-47 in two ways. Bill C-10 stipulated that relief from hardship would be an objective only if the hardship were grave. It perhaps emphasized the principle of self-sufficiency by adding that the "reasonable period of time" be "after the making of the maintenance order".

c. Objectives of Child Support Orders (subs. (7))

Bill C-47 would set out two objectives for these orders:

- to recognize that parents have a joint financial obligation to care for their children;
- to determine each spouse's financial responsibility according to his or her ability to pay.

Bill C-10 had a similar provision.

2. Time Limits on Support Orders (Clause 15, subs. (4))

Under judicial interpretation of present divorce law, a court may not set an expiry date to a support order. Bill C-47 would allow a court to do so, either by indicating a period of time or an event (e.g. when the spouse has finished a course of training or studies) after which the obligation to support would no longer exist. However, such an order could be varied before it elapsed, and even in some cases after it elapsed. Variation will be discussed further on.

Bill C-10 would have allowed a court to fix a limit to a support order without giving the dependent spouse any opportunity to vary that order before or after it elapsed.

3. Variation of Support Orders (Clauses 17-20)

a. Powers of the Court (Clause 17)

The present Divorce Act gives no indication of what powers the courts have to change support orders, and little indication of what principles should guide courts in making these orders (outside the direction to consider "changes in the conditions, means or other circumstances of the spouses"). Bill C-47 would make it clear that judges have the power to change, rescind (nullify) or suspend any or all provisions in an order

subs. (1)). It would also make it clear that an order to vary could apply prospectively - to some time in the future - or retrospectively (subs. (1)). An exception to the general power to make a retrospective order would be the case where a termination date or event is set out in the order to be varied (subs. (8)). In that case the applicant spouse would have to apply to vary the order before the limitation date unless the court is satisfied that:

- an order to vary is necessary to relieve economic hardship arising from a material change in circumstances that is related to the marriage; and
- if the changed circumstances had existed at the time the order to be varied was made, another order would likely have been made.

Under Bill C-47 as well, the basic factor determining a variation order would be a material change in initial circumstances (subs. (3)). The word "material" is an addition. It codifies present judicial practice. Objectives for varying orders would be explicitly set out (in subs. (5)), and would be the same as those governing the making of initial orders.

As was remarked above, Bill C-10 would not have allowed a support order with an expiry date to be varied. It would also have been more cursory in its whole treatment of variation.

b. What Court May Hear Applications to Vary (Clauses 5, 18 and 19)

Under present law the only court which can vary a support order is the court which granted it. This can cause problems when one (former) spouse, or both, leaves the province or district where the order was obtained.

Bill C-47 would extend jurisdiction to vary to a court in the province where one spouse "habitually resides", and to a court in any province on which both spouses can agree (clause 5).

Allowing a spouse who lives in one province to vary an order in that province while his or her spouse lives in another may cause problems for the out-of-province spouse. He or she may object to the order being changed, but may not be able to afford the time or money necessary to

fight the action in the other province. To solve this problem Bill C-47 would provide that where a variation order is made against a former spouse who lives in another province and who has not taken part in the proceeding to vary, the order has no legal effect until it is confirmed by a court hearing in that other province (subs. 18(2)). Administrative provisions for doing this are set out in subclauses (18(3)-(6)) and clause 19.

Bill C-10 would have extended jurisdiction to vary in the same way. However, it would not have provided the same solution to the problem of spouses who live in different provinces. Instead, Bill C-10 would have allowed a court to decline jurisdiction to vary if it found "on the balance of convenience" that the province was "inappropriate" for the exercise of its jurisdiction.

4. The Validity of Initial Applications for Support Made After a Divorce is Granted (Clause 2 - Definitions of "Corollary Relief Proceeding" and "Divorce Proceeding"; Clause 15(1) and (2))

It may happen that due to changed circumstances a spouse who does not need or ask for support at the time of divorce is forced to do so later. The present Act does not clearly indicate that courts have the power to receive this kind of application, although judges have allowed these applications under certain circumstances. Lawyers have tried to circumvent the ambiguous wording of the present Act by the dubious practice - from the point of view of legal interpretation - of asking for an order for some nominal amount at the time of divorce, which may be varied later on if necessary.

Through the wording of various clauses, as set out above, Bill C-47 would make it clear that a support application can be brought independently of a divorce proceeding (so long as a divorce has been granted). The wording of the relevant provisions of Bill C-10 would have done nothing to solve this problem.

5. General Comments Regarding Support Provisions

Both Bill C-10 and C-47 try to improve the present law. The reaction of most women's groups to Bill C-10, including the National Action Committee on the Status of Women, was not favourable. NAC argued that the wording of Bill C-10 allowed the court to focus on the objective of self-sufficiency to the detriment of other relevant considerations. They

provided two examples. In the first, the wife is about age 50. Since her marriage at 25 she has stayed at home to care for the children. When she separates she is luckily able to get a clerical job. It is low-paying, has little prospects for advancement, and of course gives her no retirement benefits, but it supports her. Her husband is an executive who for some time has earned a very comfortable living. Under Bill C-10 it would be possible for this woman to be awarded little or no support because she is largely self-supporting (although she does not live in the way she lived before the divorce), and hers is not a case of grave economic hardship.

The second case involves a couple with young children. They have decided that the wife should stay at home to care for the children. After separating the husband argues that his wife should get a job, even though he is able to support both her and her children at home. The wife has few marketable skills, and again is not likely to be employed at anything but a low-paying job with little opportunity for advancement. Under Bill C-10 it would be possible for a court to award the wife support until she found a job - any job; after that, support would stop, with no possibility of the wife coming back to court to ask for support to resume, even when she lost her job.

Bill C-47 would help reduce the focus on self-sufficiency. The objective of relieving "grave economic hardship" would be changed to the relief of "economic hardship". It would be possible to vary limited-time orders and to suspend orders. The express direction to consider the needs of the spouses, the length of time they have been married, and their respective functions within the marriage would also serve to turn the court's attention to considerations other than those of making a non-earning spouse self-sufficient as quickly as possible.

NAC also objected to the provision in Bill C-10 that would have allowed a court in one province to vary an order when the spouse affected by the order lived in another province. (As an aside it is unclear whether the power of the court to decline jurisdiction, which Bill C-10 did provide, would have solved the problem of the out-of-province spouse.) NAC in fact proposed the solution now provided in Bill C-47.

The clarification in Bill C-47 as to when one could begin a support proceeding will be welcome to all lawyers practising family law.

The provision is also necessary to protect a spouse in cases where a divorce proceeds without an oral hearing. (See p. 10)

B. Custody

1. General Provisions (Clause 16)

As is the case with support orders, the present legislation provides little direction to courts with respect to the making of custody orders. Courts are simply given the power to provide for the custody, care and upbringing of the "children of the marriage" (a defined term) having regard to the conduct of the parties and the condition, means and circumstances of each of them. Again, as in the case of support our thinking about the factors relevant to making custody decisions has evolved. For example, it is now accepted that such decisions should centre around the best interests of the child, rather than the circumstances of the parents. This principle has been incorporated into most provincial custody legislation. Bill C-47 would make the best interests of the child the only factor in deciding custody. The child's interests would be determined by reference to the condition, means, <u>needs</u> and other circumstances <u>of the child</u> (subs. (5)). However, the Bill would establish it as a principle that it is in a child's best interests to have as much contact with each spouse as is appropriate (subs. (6)).

Under present legislation it is not clear whether access or joint custody awards can be made to parents, or whether custody can be awarded to someone who is not a child's parent - a grandparent, for example. Bill C-47 would clarify the first two issues: both access and joint custody orders would be permitted (s. 5(1); subs. (3)).

The Bill would not expressly state that custody awards can be made to those who are not parents. It would provide that only a parent can <u>apply</u> for custody (subs. 16(1)). However, it would also allow judges to make a custody order (but not an access order) in favour of any one or more "persons" (subs. (3) - the Bill does not use the word "spouses"). Moreover, s. 25 would provide that a province could make rules regulating the addition of parties to proceedings. Together these provisions would not altogether preclude a custody award to third parties. They would seem to leave it to each province as to when this should be done and even whether it should be done.

It should be noted that there may be a jurisdictional problem in this area. It may be argued that the federal government's jurisdiction over custody issues extends to settling matters between a divorcing couple only. To grant custody to third parties would be to encroach on provincial jurisdiction over family life.

In addition, under Bill C-47 custody orders could be given an expiry date (subs. (4)). There would be specific provisions for variation which incorporate the principles governing the initial orders (clause 17, subs. (1), (4), (6) and (7)).

Bill C-10 would not have made the best interests of the child the only factor in determining custody, but the paramount factor. The word "paramount" has been the subject of much judicial dispute in this area. Recent case law does seem to indicate that "paramount" essentially means "only". However, there is enough doubt surrounding the interpretation of the term to make it worthwhile being precise about the matter, which Bill C-47 would do.

Bill C-10's custody provisions differ from those in Bill C-47 in two other ways. Bill C-10 would have made it clear that a third party could apply for custody, with leave of the court, and could be granted custody. It would have also given the court the power to appoint a lawyer to represent a child where the proper protection of the interests of the child required it. Such a provision would require provincial cooperation for its implementation, since it is the provinces which would bear the cost.

2. What Court has Jurisdiction to make a Custody Order? (Clause 6)

Under present law the spouse who starts a divorce action first has the right to have the action proceed in his or her province. However, the other spouse may not be living in that province. This creates a problem when the spouse who asks for the divorce - say, the father - also wants custody of the child, but the child is with the mother in the other province (or the child has been taken from the mother by the father). If it is the father who has moved after the couple has separated, or if both parents have moved, but the mother has custody, all of the important evidence as to how the child lives - what the home life of the child is

like, what friends she has, what sort of schooling she is getting - is available in the mother's province, not the father's. Under these circumstances, it is surely unfair to force the mother to fight the custody issue in the father's province, especially if she cannot afford to do so.

Bill C-47 would address this problem. In the case where a child is "closely associated with another province", the mother would be able to apply to the court in the father's province to transfer the whole divorce proceeding or a custody proceeding to a court in her own province. A similar provision would exist with respect to the variation of a custody order. Bill C-10 would not have addressed this issue.

PROVISION TO GRANT UNOPPOSED DIVORCES ADMINISTRATIVELY, WITHOUT A JUDICIAL HEARING (Para. 25(2)(b))

At present all divorces must proceed by a court hearing which takes the form of a trial, even though a number of divorces are unopposed not only on the issue of a spouse's entitlement to a divorce but on the issues of support and custody. It is the practice in most provinces to schedule uncontested divorce hearings in clusters on certain days of the week or month. Inevitably, given the number of divorces heard during that time, the procedure loses much of the formality and dignity of a court hearing. However, the high costs of a hearing, however short - lawyer's fees, administrative costs - remain to be borne by divorcing clients and taxpayers. Bill C-47 would allow divorces to proceed without a hearing where the spouses were required to appear. The rules governing such a procedure, and the decision as to whether the procedure should be adopted in the first place, are left to the provinces. It should be remarked in this regard that Bill C-47 would prevent a court from granting a divorce on the basis of a one-year separation if this would "prejudicially affect the making of reasonable arrangements for the support of any children of the marriage" (clause 11). This would seem to require a court to make inquiries into custody arrangements in all cases, including those proceeding without a hearing.

Bill C-10 contained a similar provision.

RECONCILIATION (Para. 8(b)(ii), Clause 9, 10)

Bill C-47 would make the following provisions for reconciliation. First, spouses would be allowed to live together for one period of three months or a number of periods totalling not more than three months for the purposes of reconciliation, without that time interrupting the calculation of the one-year separation period needed to obtain a divorce (para. 8(b)(ii)). A spouse would not be able to obtain a divorce on a fault ground if he or she condoned, that is, forgave, the fault. A similar three-month provision would exist to ensure that attempts at reconciliation were not counted as condonation (subs. 11(3)) Second, lawyers acting on behalf of each spouse would be required to draw their attention to the provisions of the Act relating to reconciliation, to discuss the possibility of reconciliation with them, and to give each spouse any information on marriage counselling or guidance facilities they have, unless it would be inappropriate to do so (clause 15). Third, before a divorce court considers the evidence in a divorce proceeding, it must ascertain from the spouse bringing the proceeding, and, where the action is contested, the other spouse, whether there is a possibility of reconciliation, unless it were not appropriate to do so (clause 10). There would be provision for adjourning the proceeding for two weeks if it appeared that reconciliation was possible.

Most of these provisions are contained in present legislation and would have also been retained by Bill C-10. The one important difference, which was also included in Bill C-10, concerns the three-month reconciliation period. Under present law spouses are allowed only one period to reconcile. The time may be as long as three months, but one cannot, for example, separate, live together for two months, separate again, live together again for another month, finally separate, and include both reconciliation periods in the reconciliation time.

It should be noted that the force of a provision for a court to make inquiries about reconciliation would probably be lessened in the case of a proceeding where the spouses did not have to appear.

MISCELLANEOUS PROVISIONS

All these would also have been enacted under Bill C-10.

A. Securing Maintenance Payments (Subc. 15(2))

Bill C-47 would allow courts to order that property be held as security in case the supporting spouse stopped making payments. The present Act does not allow this to be done.

It is not clear how useful this provision would be. It would of course only be applicable where the supporting spouse has assets other than the capacity to earn income. Moreover, for constitutional reasons the court would arguably not have the power to sell the property which serves as security when the supporting spouse stops paying. The dependent could only recover what was owing to her (or him) when the owner spouse chose to sell.

B. Residency Requirement (Subc. 3(1))

Under Bill C-47 the residency requirement for anyone applying for a divorce would be "habitual" residence for one year in a province where application is made.

The present requirement is complex: the petitioner must have been domiciled in Canada for one year; either the petitioner or his spouse must have been ordinarily resident in the province for one year and actually resident for 10 months. This provision makes it difficult for people who are mobile either from province to province or country to country to get a divorce in Canada. The new provision gives them more flexibility but also stops Canada from becoming a "divorce haven".

C. One Divorce Decree (Clause 12)

Under present law there are two divorce decrees: a conditional decree (the "decree nisi"), and a final judgment (the "decree absolute"). Ordinarily there is a three-month waiting period between the two, during which time neither spouse can marry. Under certain circumstances the court may even refuse to grant the decree absolute. Under Bill C-47 there would be only one divorce judgment. The judgment would take effect 30 days after it was issued provided there were no appeals. The court would have the discretion to shorten this period.

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